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**IN THE
COURT OF APPEALS OF INDIANA**

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|-----------------------|---|-----------------------|
| AMY FETZ, |) | |
| |) | |
| Appellant-Petitioner, |) | |
| |) | |
| vs. |) | No. 41A01-0709-CV-437 |
| |) | |
| THOMAS FETZ, SR., |) | |
| |) | |
| Appellee-Respondent. |) | |

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 41C01-0605-DR-192

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Amy Fetz (“Mother”) appeals the custody provisions of the dissolution decree ending her marriage to Appellee-Respondent Thomas Fetz, Sr. (“Father”). We affirm.

Issue

Mother presents a single issue for review: whether the judgment is contrary to law when Mother was awarded sole legal custody of the children based upon the trial court’s finding of their best interests, but Father was awarded physical custody and child support.

Facts and Procedural History

The parties were married on November 2, 1992. They have four children, B.F., born October 10, 1992, A.F., born September 6, 1993, K.F., born November 28, 1994, and T.F., born May 1, 1996 (“the Children”).

On May 24, 2006, Mother petitioned for dissolution of the marriage. According to the terms of a Preliminary Agreement, Mother continued to reside in the marital home with the Children. The parties each sought permanent custody of the Children, and a custody evaluator was appointed. The custody evaluator recommended that Mother have custody of the Children.

On July 24, 2007, a final hearing was conducted. On August 28, 2007, the trial court dissolved the parties’ marriage, divided the marital estate, and awarded sole legal custody of the Children to Mother. However, Father was deemed to be the “custodial parent for purposes of the Indiana Parenting Time Guidelines and for determining school districts.” (App. 13.) Mother was ordered to pay child support in the amount of \$81.00 per week. She

was awarded parenting time in accordance with the Indiana Parenting Time Guidelines, with minor deviations. Mother now appeals, contending that the split of legal custody and de facto physical custody is contrary to law.¹

Discussion and Decision

A. Standard of Review

Pursuant to Indiana Code Section 31-21-2-4, a child custody determination includes both legal custody and physical custody. “Physical custody” means “the physical care and supervision of a child.” Ind. Code § 31-21-2-16. “Legal custody” encompasses the “authority and responsibility for the major decisions concerning the child’s upbringing, including the child’s education, health care, and religious training.” Ind. Code § 31-9-2-67.

The trial court has statutory authority to determine custody and enter a custody order in accordance with the best interests of the children. See Ind. Code § 31-17-2-8. There is no presumption favoring either parent. See id. The court shall consider all relevant factors, including the age and sex of the children, the wishes of the parents, the wishes of the children, the interaction and interrelationship of the children with the parents, siblings and other significant persons, the children’s adjustment to home, school, and community, the mental and physical health of all individuals involved, evidence of domestic abuse, and evidence of care by a de facto custodian. See id.

¹ Father has filed no appellee’s brief. When an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. Rzeszutek v. Beck, 649 N.E.2d 673, 676 (Ind. Ct. App. 1995), trans. denied. The prima facie error rule protects this Court and relieves it from the burden of controverting arguments advanced for reversal, a duty that properly remains with counsel for the appellee. Id.

Child custody determinations are within the discretion of the trial court and will not be disturbed except for an abuse of discretion. In re B.H., 770 N.E.2d 283, 288 (Ind. 2002). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court or the court has misinterpreted the law. Van Wieren v. Van Wieren, 858 N.E.2d 216, 223 (Ind. Ct. App. 2006).

B. Analysis

Here, the trial court made the following pertinent findings:

That based upon all of the evidence presented in this case, the Court finds and concludes that it is in the best interest of the minor children that the [Mother] be awarded legal custody of the said minor children, and therefore, the [Mother] is awarded sole legal custody of the minor children.

That though the Court has provided sole legal custody of the children to the [Mother], based upon her nighttime employment at Best Buy, and the benefit of an available co-parenting partner, a deviation in the Indiana Parenting Time Guidelines is appropriate.

For purposes of the Indiana Parenting Time Guidelines and for determining school districts, the [Father] shall be defined therein as the “custodial parent.”

[Mother] shall be entitled to parenting time with the minor children as set out in the Indiana Parenting Time Guidelines with the following modifications . . .

For purposes of the Indiana Child Support Guidelines and Guideline Worksheet, the Court finds and concludes as follows: . . .

That in accordance with the worksheet, the [Mother] is hereby ordered to begin paying the sum of Eighty-One Dollars (\$81.00) per week through the Clerk of this Court[.]

(App. 13-14.) The trial court is required to award custody consistent with the best interests of the children involved. See Ind. Code § 31-17-2-8. Here, the trial court found it to be in the best interests of the Children that Mother exercise authority and responsibility for major decisions concerning the Children. However, the trial court also found that Father was best

suited to have the physical care of the Children because his work hours were more compatible with the Children's schedule. In Father's care, the Children need not be left alone all night or taken out of the residence to sleep at a babysitter's residence.

We are aware of no specific prohibition in the Indiana Code against splitting legal custody and physical custody where such an arrangement is in the best interests of the child or children. Moreover, a trial court is not required to follow the recommendation of a custody evaluator in awarding physical custody. See Trost-Steffen v. Steffen, 772 N.E.2d 500, 510-11 (Ind. Ct. App. 2002) (holding that the fact-finder is not required to accept opinions of experts regarding custody, but may consider such evidence), trans. denied.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.